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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-452

TWENTIETH CENTURY MUSIC CORPORATION
and MARY M. BOURNE,

Petitioners,

v.

GEORGE AIKEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Has not this Court "limited to its own facts" *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, so as to preclude a direct conflict between the decision in that case, which involved an *unauthorized* broadcast performance of copyrighted works, and the decision below in the

instant case, which involved an *authorized* broadcast performance?

2. Has not this Court, by its decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, clearly established a functional standard for determining what is a "performance" under the Copyright Act; and did not the Court of Appeals decide corectly to apply that standard, instead of extending the quantitative standard of *Jewell-LaSalle*, to the case at bar?

STATEMENT OF THE CASE

Respondent George Aiken owns and operates a fast-service food establishment in downtown Pittsburgh, Pennsylvania (Tr. 3, 4, 53).[1] The restaurant sells food for consumption on and off the premises and can accommodate approximately 40 patrons at counters and booths (Tr. 7, 55). Normal over-the-air radio broadcasts are heard by patrons and employees of the restaurant by virtue of the connection of a single radio tuner to five loud-speakers. Two of the speakers are located in the public portion of the restaurant, and the other speakers are found in the kitchen, washroom and office of the restaurant. (Tr. 54, 57, 58.) It is George Aiken's practice to switch on the radio at the beginning of each business day and thus have regular radio broadcasts audible in the restaurant during business hours (Tr. 54, 55). No effort is made to exclude any part of the broadcasts; accordingly, news, musical programs and commercials are all heard in the establishment (Tr. 55).

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[1] Record citations are to the official transcript ("Tr.") of trial proceedings.

On March 11, 1972, Respondent's radio was tuned to station WKJF-FM, Pittsburgh, at which time two musical compositions, "The More I See You" and "Me And My Shadow," were heard by at least six patrons in the restaurant (Tr. 4, 5, 6). WKJF-FM was authorized to perform those and other musical works under a standard FM broadcast license issued by the American Society of Composers, Authors and Publishers ("ASCAP") (Tr. 15).

ASCAP is an association which is authorized to license the right of public performance of copyrighted musical works, here specifically those of Petitioner Twentieth Century Music Corporation, copyright proprietor of "The More I See You," and Petitioner Mary M. Bourne, copyright proprietor of "Me and My Shadow" (Tr. 3, 12, 13).

ASCAP has licensed other commercial establishments which utilize a radio tuner and external speakers (Tr. 18, 19, 28). ASCAP presently has direct license agreements with 5,150 business firms. These agreements authorize the licensee to play tapes and records as well as to use radio and speakers for the presentation of copyrighted works. Under the agreements, ASCAP receives annual royalty payments of $246,000. (Tr. 35; 356 F. Supp. at 273.) These annual fees constitute 0.35% of ASCAP's total annual revenues of $70 million (Tr. 42).

On June 2, 1972, Petitioners-plaintiffs filed a complaint in the U.S. District Court for the Western District of Pennsylvania, alleging that Respondent-defendant Aiken had, by tuning in and amplifying WKJF-FM's performance of Petitioners' musical compositions, publicly performed those works for profit, within the meaning of the Copyright Act, 17 U.S.C. § 1, *et seq.* Petitioners requested that Aiken be enjoined from making the alleged public performances and

that he pay such damages as the Court deemed proper, but not less than $250 in each cause of action.

On March 26, 1973, judgment was entered against George Aiken and in favor of Petitioners in the sum of $250 for each Petitioner (256 F. Supp. 271 (W.D. Pa. 1973)).

The trial court's decision was reversed by the U.S. Court of Appeals for the Third Circuit, which, applying the "functional" test adopted by this Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, and enlarged upon in *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, concluded that Aiken's "extension of the range of audibility of a broadcast program" did not constitute a "performance" within the meaning of the Copyright Act (500 F.2d 127, 137 (1974)).

ARGUMENT

1. The decision below does not conflict directly with this Court's decision in *Jewell-LaSalle*.

Petitioners assert that the decision of the court below conflicts with the decision of this Court in *Buck v. Jewell-LaSalle Realty Co., supra*. That contention is without merit.

In *Fortnightly Corp. v. United Artists Television, Inc., supra*, this Court expressly ruled that "[t]he *Jewell-LaSalle* decision must be understood as limited to its own facts."[2]

[2] 392 U.S. at 397 n. 18.

Moreover, before stating that generalization, the Court characterized the critical facts of *Jewell-LaSalle* in such a manner as to distinguish them precisely from the facts of the case at bar. The Court stated:

> "***But in *Jewell-LaSalle*, a hotel received on a master radio set an unauthorized broadcast of a copyrighted work and transmitted that broadcast to all the public and private rooms of the hotel by means of speakers installed by the hotel in each room. The Court held the hotel liable for infringement but noted that the result might have differed if, as in this case, the original broadcast had been authorized by the copyright holder. 283 U.S. at 199, n. 5. The *Jewell-LaSalle* decision must be understood as limited to its own facts.***"[3]

Thus, it was the Court's view at the time of *Fortnightly* that a critical fact in *Jewell-LaSalle* – at least for the purpose of limiting the old case – was the fact that the radio broadcast of a copyrighted work was not authorized by the copyright holder.[4] In the instant case, however, the broadcasts in question *were* authorized.[5]

[3] *Id.*

[4] Law review commentators also so read footnote 18 of the *Fortnightly* opinion. *See e.g.*, Comment, *The Copyright Law and its Relevance to CATV: Can An Old Dog Be Taught New Tricks*, 19 BUFF. L. REV. 65, 78 (1969); Comment, *CATV and Copyright Liability, The Final Decision*, 1 CONN. L. REV. 401, 404 (1968); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 273 & n. 11 (1968); 25 HAST. L.J. 1507, 1513 (1974); 47 N.C.L. REV. 914, 920 (1969).

[5] Also, as the Court in *Fortnightly* observed, the broadcast at issue in *Jewell-LaSalle* was transmitted to all the public rooms and

(continued)

The factual differences of the instant case necessarily place it outside the decision of *Jewell-LaSalle*, when the latter is "understood as limited to its own facts."[6]

The Court of Appeals below, while correctly deciding that respondent Aiken's reception of copyrighted material on radio broadcasts was not a "performance" of that material within the meaning of the Copyright Act, incorrectly characterized this case as being on "all fours" with the *Jewell-LaSalle* case.[7] As has been demonstrated above, this is inaccurate, because the cases are easily distinguishable. Therefore, it matters not whether the *Jewell-LaSalle* case has been effectively overruled, as Justices Fortas and Blackmun suggested in dissenting opinions in *Fortnightly*[8] and *Teleprompter*[9] and as the Court of Appeals below also seemed to conclude.[10] What does matter for purposes of

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5 (continued) private guest rooms of the hotel, which must have involved a complex system of hundreds of speakers. In the instant case, however, the five radio speakers in respondent Aiken's restaurant were confined to one room which was open to the public, plus areas open only to employees. This factual distinction can be better appreciated when examined in the light of ASCAP's own policy of not demanding license fees from establishments which use only one radio speaker (See Petition 16 n.).

6 *See* Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 370-71 ("Plainly, therefore, the case must have rested upon considerations peculiar to its own facts. Those are not the facts now before us.").

7 500 F.2d at 135.

8 392 U.S. at 404-08.

9 415 U.S. at 415-16.

10 500 F.2d at 136 n. 21.

disposing of the petition for writ of certiorari is that there is no definite and direct conflict between *Jewell-LaSalle* and the instant case. "That the conflict must be direct is emphasized by the fact that although old Rule 38(5)(b) required only a showing that the decision of the Court of Appeals is 'probably' in conflict with applicable Supreme Court decisions, the present Rule 19(1)(b) omits the word 'probably.' "[11]

Considering this Court's absolute rejection of the rationale of *Jewell-LaSalle* (see part II, *infra*) and its severe limitation of that "questionable 35-year-old decision"[12] to its own facts, the Court should conclude that the decision below in this case does not conflict with *Jewell-LaSalle*.

II. The court below correctly construed this Court's decisions in *Fortnightly* and *Teleprompter*.

Petitioners argue that this Court's opinions in *Fortnightly* and *Teleprompter* are applicable only to cable television. Such a ruling now would be most surprising, because the *ratio decidendi* of those cases is not so restrictive. Rather, the Court's analysis is in terms of broadcasting generally as well as television specifically.

The Court of Appeals notes[13] that in *Fortnightly*[14] this Court had quoted with approval the rationale of a radio broadcast case, *Buck v. Debaum*:

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11 R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, § 4.5, at 158 (4th ed. 1969). In revising its rules in 1970, the Court made no change in Rule 19.

12 392 U.S. at 401 n. 30.

13 500 F.2d at 137 n. 22.

14 392 U.S. at 398 n. 24.

> "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law."[15]

In the *Fortnightly* opinion[16] the Court stated: "Broadcasters perform.[23] Viewers do not perform.[24]" Footnote 23 includes citations to radio broadcast cases in each of which a broadcaster, not the listener, was held liable for an unauthorized use of a copyrighted work. The footnote also states that "Congress in effect validated these decisions in 1952 when it added to §1(c) a special damages provision for 'infringement by broadcast.' 66 Stat. 752."

While Congress has specifically codified court rulings proscribing "infringement by broadcast," it has not added language to the Copyright Act which would recognize any prohibition of receptions of broadcast works. In *Fortnightly* the Court implicitly made this point in using the 1952 amendment to support its distinction between broadcasters and viewers for purposes of copyright liability. Petitioners, however, do not mention this selective codification by Congress and its implication against inclusion of broadcast receptions as an infringement of copyright.[17]

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15 40 F.2d 734, 735 (S.D. Cal. 1929).

16 392 U.S. at 398.

17 Instead, Petitioners claim support for their position from the *inaction* of Congress with respect to bills which would have specifically exempted radio receptions from the reach of the Act. However, Petitioners fail to find similar negative implication in the failure of Congressional bills, relied on in its own Petition, which would have specified copyright liability for such radio receptions. (Petition 15-16.)

Footnote 24 of *Fortnightly* is the *Debaum* language quoted above. *Debaum* involved a fact situation very similar to the one at bar, including the authorized use of a copyrighted song by the broadcaster and its reception and amplification by a cafe owner.[18]

Petitioners not only ignore this Court's approval of *Debaum* but appear to misunderstand the similar uses of broadcast matter to which cable television systems are put. Just as the restaurant owners in *Debaum* and this case amplified their radio receptions for the enjoyment of customers and employees, so do hotels, motels, bars, restaurants and other business establishments subscribe to cable television for these entertainment purposes.[19] Thus, petitioners are patently incorrect in stating with respect to cable television that "each subscriber owns his own television set and the cable systems merely enhance the capacity of those private sets to receive – in the privacy of the subscriber's own home – programs broadcast by television stations . . ." (Petition 12).

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18 The District Court stated in *Debaum:*

> "The owner of a copyrighted musical composition can fully protect himself against any unauthorized invasion of his property right by refusing to license the broadcasting station to perform his musical composition; but, when he expressly licenses and consents to a radio broadcast of his copyrighted composition, he *must be held* to have acquiesced in the utilization of all forces of nature that are resultant from the licensed broadcast of his copyrighted musical composition."
> 40 F.2d at 736 (emphasis added).

19 *See Fortnightly*, 392 U.S. at 393 n. 7; *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872, 875 (2d Cir. 1967); Record, Vol. 1 at 219a, Transcript of District Court Proceedings, Sup. Ct. Case No. 618, Fortnightly Corp. v. United Artists Television, Inc.

Petitioners also ignore the fact that, under the *Fortnightly* and *Teleprompter* decisions, cable systems may carry FM broadcasts of the very kind involved here without any potential copyright liability.[20] It would indeed be anomalous if small businesses could not receive and amplify these radio programs within their own establishments while cable systems may receive, amplify and distribute these radio programs to a large number of such establishments, without copyright licensing.

Respondent Aiken is much less of an "active" participant when he receives radio programs in his own establishment than is a cable system (with or without "distant signals") when the system provides both television and radio programs to many commercial and home subscribers. In both cases, when the copyrighted materials are authorized for the broadcasts in question, the act of reception and amplification of those broadcasts "falls on the viewer's side of the line."[21]

The significance of the fact that the broadcast-station "performances" are authorized by the copyright holders, in the case of both cable television and radio extension speakers, is further suggested in the Court's opinion in *Teleprompter*. There the Court explained that when a cable system extends the audience otherwise available to the broadcaster both the broadcaster and the copyright holder may charge higher fees, for commercial advertising and copyright licensing respectively.

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20 This point was made in the testimony of the then General Counsel of ASCAP, Herman Finkelstein, in *Hearings on S. 1006* (Copyright Law Revision - CATV) *Before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee*, 89th Cong., 2d Sess. 140 (1966).

21 *Fortnightly*, 392 U.S. at 399.

"By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor.*** From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.

"These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."[22]

This explains why copyright holders are not likely to be unfairly injured by the ruling that radio pickups like Respondent Aiken's do not constitute "performances" under the Copyright Act. The license fees charged broadcasters should reflect the sizes of their audiences, and those audiences include customers and employees in business establishments using radio speaker systems.

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22 415 U.S. at 412-14 (footnotes omitted). *See* note 17, *supra*, and accompanying text.

Petitioners' own evidence fails to show that the decision below will have anything more than a minuscule economic impact upon copyright holders. ASCAP, the copyright pool, has annual gross revenues of more than $70 million. From the 5,150 direct copyright licenses of the kind involved in this case, ASCAP annually derives about $246,000, or a mere 0.35% of its total revenues. Moreover, these licenses include authorization for the businesses to use tape and disc recordings of copyrighted works. Even if all of these 5,150 businesses use radio and loudspeakers, there is no evidence that many do not also play recorded music under the same license agreement; and the necessity for continued licensing in order to make the latter use of copyrighted works is not affected by the decision below.

While, as petitioners note (Petition 13), the trial court found that a decision in this case adverse to ASCAP "might have an effect upon the fee level" for copyright licensing of background music services like Muzak, the magnitude of that effect is not a matter of record evidence. Even if it were assumed *arguendo* that the entire amount of such licensing fees, some $2,100,000 annually, were lost to ASCAP (a most unrealistic assumption), the total gross revenue loss to ASCAP (*i.e.*, $2,346,000) resulting from the decision below would be no more than 3.35% of its annual revenues. In view of the certainty that it would be much less than that figure (with ASCAP also having the opportunity to negotiate or litigate for higher broadcast licensing fees), there is no basis for Petitioners' claim that the decision below would disrupt important economic relationships.

Further, even if there were a showing of actual economic injury to copyright holders, "such a showing would be of very little relevance to the copyright question [*i.e.*, whether there has been a "performance"] we decide here.*** While

securing compensation to the holders of copyrights was an essential purpose of that Act, freezing existing economic arrangements for doing so was not." *Teleprompter*, 415 U.S. at 413-14 n. 15.

Certainly there is here no threatened disruption of existing relationships with the importance and repeated judicial support of the industry-wide relationships involved in *Flood v. Kuhn*, 407 U.S. 258, relied upon by Petitioners (Petition 14-16). Moreover, in the *Flood* case there was definitely a conflict of decisions to which the *stare decisis* doctrine was applied when the case was considered on its merits. In the instant case, there is no such direct conflict, as explained in part I above, and thus, in view of the *Fortnightly* and *Teleprompter* decisions, there is no need for the Court to review the decision below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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